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Director Justice Policy

NSW Department of Justice

GPO Box 31,

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Dear Sir/Madam

**FACS Submission on the statutory review of the Government Information (Public Access) Act 2009 and Government Information (Information Commissioners) Act 2009**

The Department of Family and Community Services (FACS) welcomes the opportunity to comment on the statutory review of public access legislation, whether the policy objectives of the Acts remain valid and whether the Acts are able to meet these objectives.

**Objects of the legislation**

As stated in section 3 of the *Government Information (Public Access) Act 2009* (GIPA Act) the object of the legislation is to maintain and advance a system of responsible and representative democratic government that is open, accountable, fair and effective by opening government information to the public and providing that access to that information is restricted only when there is an overriding public interest against disclosure.

Use of the broad expression 'information' is intended to remove the focus of earlier legislation on documents, encouraging an emphasis on how to release information rather than focusing on what documents can be released or withheld.

The Act nevertheless recognises that some limits to the free flow of information are consistent with the operation of responsible government, including the need for agencies to operate effectively and fairly. These limits are set out in Part 2 Division 2 of the GIPA Act, as permissible grounds for applying a public interest test on whether to withhold information; and in Schedules 1 and 2, which itemise classes of information for which there is conclusive public interests against disclosure and information of prescribed agencies which is excluded from access requirements.

Overall the Act strikes a reasonable balance between release and withholding information. However, this submission makes the case for considering additional

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classes of information that may merit greater protection by way of a conclusive public interest against disclosure.

The GIPA Act also sought to better address how the principle of open Government operates when delivery of public services is increasingly transferred to the non-government sector, by more precisely specifying what information is 'held' by an agency. The review of the Act should consider experience of how the balance between openness and protection of interests of external providers operates in practice.

**Definitions**

The GIPA Act's definition of agency, as among other things, a Government Department or Public Authority (together with the definition of public authority in Schedule 4 of clause 2 to include a statutory authority), can give rise to uncertainties as a result of administrative changes that have taken place since 2009 and the way statutory authorities have been effectively merged with Departments under the *Government Sector Employment Act 2013*.

Schedule 4 Clause 6 of the GIPA Act allows agencies to be declared as parts of other agencies and Schedule 3 of the Government Information (Public Access) Regulation gives effect to this by declaring the Land and Housing Corporation, NSW Disability Council and Registrar under the Aboriginal Land Rights Act to be part of the Department of Human Services. In fact, since this Schedule was made, the Land and Housing Corporation migrated and then returned to the Department of Family and Community Services and the Registrar of Aboriginal Land Rights migrated permanently.

Schedule 3 of the Regulation needs to be up-dated to reflect current administrative arrangements, and include the NSW Home Care Service and Aboriginal Housing Office as agencies included in the Department of Family and Community Services.

Part (b) of the definition of government contract in Schedule 4 clause 1 causes problems of interpretation in the context of the transfer of direct provision of services to the non-government sector. It is not clear whether 'a contract under which a party agrees to provide specific goods and services (such as information technology services)' is limited to services that enable an agency to perform its own functions or extends to funding agreements whereby an agency promotes economic and social outcomes beyond its own immediate responsibilities. The identification of a subset of government contracts in section 121 where services are provided by a contractor on behalf of an agency further complicates the issue. Greater clarity as to how the definition applies to external bodies funded to provide services would be welcome.

**Access to information otherwise than through an access request.**

The objects of encouraging the free flow of information is promoted by requiring agencies to release or consider releasing information in other ways than through formal access applications.

**Open access information**

Open access information includes

- agency information guides designed to assist members of the public to understand the scope and structure of agency activities;
- the agency's register of government contracts containing details of contracts valued at $150,000 or more;
- policy documents that an agency relies on when making decisions that affect members of the public;
- disclosure logs of information that has been released in response to an access request, subject to some exceptions; and
- a register of open access information that is withheld on the grounds of an overriding interest against disclosure.

As discussed, a clearer definition of government contract would assist agencies to comply with the second dot point.

The definition of policy document is wider than those documents that an agency identifies as its policies. Decisions that affect members of the public are often found in procedures and guidelines. These documents can become out-dated, and this can present challenges to making them publicly accessible. A benefit of making policy documents accessible is that it encourages agencies to systematically manage their policies and procedures.

**Proactive release**

The objective of encouraging agencies to identify information that may be of interest to the public generally and to publish or release it without waiting for an access application remains valid and consistent with open Government policies. However, the way the current section 7 seeks to implement this does not take sufficient account of the how different kinds of agencies can best achieve this aim.

In larger departments that deliver a range of services and regulatory activities, communication with the public takes multiple and varied forms, and frequently occurs without reference to section 7 of the GIPA Act. Requiring agencies to identify express authority to release information proactively and to annually review their programs for proactive release is potentially counterproductive. It creates an expectation that all proactive communications with the public are made in accordance with section 7 or routed through a right to information unit.

**Informal release**

Release of information in response to an informal request has provided a useful way of flexibly meeting peoples need for information. The ability to impose non-reviewable limits and conditions on informal release when information is provided in this way can be an effective way of keeping members with a special interest in the working of the Department in the loop without necessarily putting sensitive

information into the public sphere. An example would be when details of an investigation are released to the person who has brought a complaint subject to a confidentiality condition.

However, at times FACS has had to manage the expectation that an application for informal release is a convenient means of sidestepping the protections for the Department and third parties that apply when a formal access application.

**Formal access applications**

**Access applications for personal information**

The Information Commissioner's recent report on the operation of the GIPA Act indicates a degree of overlap between peoples' right to access their personal information under privacy legislation and access applications for personal information. In some instances, using GIPA to access personal information is more appropriate, for example where the information is sought for legal purposes and the applicant wants assurance that a comprehensive search has been conducted, and they are advised about any information withheld under permissible grounds.

In other instances channeling requests for access to personal information through GIPA access applications is an unwieldy way of achieving the kind of openness that both privacy and access legislation are intended to confer.

Proof of identity should be considered for inclusion in the requirements for a valid application for personal information under section 41 of the GIPA Act. All agencies have a legal responsibility to protect the disclosure of personal and health information in accordance with NSW privacy legislation. Where an application covers personal information, it is important that their identity is clearly established before a decision is made to release. This is a particular concern for agencies like FACS which holds a significant amount of sensitive personal and health information.

**Fees and processing charges for applications decided out of time**

The provisions of section 63 that require an agency to refund an application fee and prevent the agency from imposing a processing charge if an application is not decided in time appear to be a reasonable means of discouraging unnecessary delays. However, these provisions can operate extremely unevenly. It is submitted that the current time frames should be extended to allow for more time to decide complex applications.

Many decisions in relation to complex applications run over time for reasons that are beyond the control of the people responsible for making them.

Delays can result from:

- applications being misdirected within an agency,
- single applications covering a mix of personal and non-personal information with different cost and consultation implications,
- multiple applications lodged by the same applicant,
- attempts to get applicants to narrow the scope of an application that would otherwise amount to an unreasonable diversion of resources,
- sections of an agency with custody of records placing a low priority on responding,

- delays in identifying an retrieving archived records,
- complex third party consultation requirements that may not be evident until information is retrieved and processed.

The cost incentive for right to information units to process applications quickly may be misdirected as a consequence of decentralisation of cost centre within agencies or lack of control over applications for information held outside the agency.

**Unreasonable diversion of resources**

Section 60(1)(a) permits an agency to refuse to deal with an application where this would require an unreasonable and substantial diversion of the agency's resources. At a time when resources to manage access applications are stretched, agencies need to be able to rely on this provision. However, where the access application covers information held by a non-government service provider, it is not clear that a refusal can be based on the burden imposed on the service provider.

Guidance on the Information Commissioner's website notes that what amounts to an unreasonable and substantial diversion will depend on a range of factors relevant to the size of the agency, nature and complexity of the application or applications, the amount of consultation required and the degree of public interest in providing the information. A number of agencies rely on a rule of thumb whereby an estimated more that 40 hours processing time is deemed to be an unreasonable diversion. There may be circumstances where relying on a relatively arbitrary rule of thumb is unfair either to the agency, the applicant or a non-government holder of the information.

Where an agency could reasonably be expected to structure its records to facilitate a relatively straightforward search, the applicant should not be penalised by its failure to do so. Conversely, an applicant should not unreasonably require the agency to search across records that bear no relation to the way its information is structured. An agency or part of an agency with limited resources may incur substantial disbursements in arranging for external copying of voluminous information which cannot be recovered as processing fees.

The effectiveness of section 60 is limited to the extent that the subsections designed to protect agencies from multiple or vexatious applications are too narrowly expressed to be confidently applied in all instances.

**Information held by non-government service providers**

FACS accepts that the GIPA Act had to adapt to the increasing outsourcing or contracting services that were traditionally provided by Government. However, implementation of the provisions of the current Act has raised some uncertainties.

Other legislation, in particular the *Public Works and Procurement Act 1912* and regulation make a distinction between contracts for the procurement of goods and service and funding agreements whereby agencies fund the delivery of services by non-government agencies. [redacted]

The combined effect of section 121 and the definitions of government contract and government information held by an agency in Schedule 4 have significant implications for a department like FACS that is in the process of contracting out major direct service functions. Increasingly, information that is potentially subject to access applications is likely to be held by a funded service provider or by a directly funded client. This has flow on effects on time frames, third party consultations and reviews.

FACS understands some agencies have included terms in section 121 agreements to require contracted providers to provide access directly. FACS is not confident that the Act permits this and sees complications arising where decisions by contractors have to be reviewed.

We recommend a review of the relevant provisions relating to outsourced information to clarify how they should operate in the light of further experience.

[redacted]

**Third party consultation and objection**

The consultation process is also complicated where information subject to an access request is in the custody of a non-government contracted service provider. The obligation to consult is imposed on the agency rather than the contractor. However, the contractor is generally better placed to identify whether consultation is necessary and to contact those who need to be consulted. The contractor itself may be a third party objector and in this role may restrict the information provided to the agency, upon which the agency is to base an access decision.

One alternative would be to expressly permit agencies to refer an access application to the contracted service provider, which would then be responsible for making an access decision. This would be more feasible for larger contractors with the necessary administrative capacity than for a smaller contractor that would most likely have to buy in the expertise needed to comply with the rare application. Further issues would arise over internal and external review of decisions made by contractors.

A simpler approach would be to extend time frames for access requests involving contractors.

FACS holds a significant amount of sensitive information about children at risk which is not covered by the conclusive ground for withholding in Schedule 1.10. Where parental control has been removed or is in the process of being removed from a parent, the issue may arise as to who to consult in relation to an access application where there are grounds for not disclosing information to a parent or other relative that they might otherwise reasonably expect to be consulted on. To resolve this, the Act would need to specify who could exercise third party objection and review rights.

**Conclusive grounds and excluded information (Schedules 1 and 2)**

As noted in the Information Commissioner's report on the Operation of the GIPA Act, FACS relies heavily on the exclusion in Schedule 1.10 for information in a report to which section 29 of the Care and Protection Act applies. This protects both the identity of people making reports and the contents of the report that could indirectly disclose who made the report. It also protects basic intelligence which informs how the Department responds to risks of significant harm and vets carers and their household members.

Schedule 1.9 provides conclusive grounds against disclosing information about adoption procedures and receipt of amended or original birth certificates under the Adoption Act. This recognises that the Adoption Act sets out special procedures for appropriate parties to access this information that should not be undermined by an access application.

FACS also conducts reviews into the deaths of children known to the Department primarily as a means of understanding internal systemic and process issues that might have prevented them. Protection of the extremely sensitive information contained in reviews against disclosure depends on being able to apply the test under sections 13 and 14 of the GIPA Act to withhold information.

A decision to withhold information from a review in the public interest was recently subject to external review by the Information Commissioner. This raised significant concerns that the vulnerability of such information undermines the confidentiality necessary to enable reviews to thoroughly and candidly explore the circumstances of a death and identify what has been learned.. There is a strong case for extending the conclusive grounds for withholding information forming part of these child death reviews, in a similar way to the protection in Schedule 1 for statutory reviews conducted by the Child Death Review Team. We note that quality assurance committees and root cause analysis teams performing similar functions under the Health Administration Act 1982 have the benefit of a Schedule 1 exemption.

The Schedule 1.5 conclusive ground for legal professional privilege does not cover situations where FACS non-legal human resources staff prepare material for the purpose of union negotiations that may end up in the Industrial Relations Commission. Where unions make access applications, the Department is put in the position of either revealing information on the background to its negotiating position or relying on determinations that are contestable. There is a case for a wider conclusive determination to protect agencies industrial relations negotiations.

**Relationship with privacy legislation**

Where individuals seek access to their personal information, there is a degree of overlap between the GIPA Act and NSW privacy legislation. The provision under previous access legislation entitling people to seek amendment of their personal information has now been transferred to privacy legislation, where it arguably operates more consistently with other privacy principles designed to ensure that agencies take reasonable steps to ensure the accuracy, relevance, completeness and up-to-datedness of personal information they collect and use.

Agencies responding to a privacy access request can rely on all the conditions and limitations under the GIPA Act to withhold a requester's personal information

In practice agencies tend to encourage people to use privacy to access readily available information, and more formal GIPA access requests to access larger amounts of information or information that is sensitive, involves a mix of personal and non-personal information or is required for a formal purpose, for example potential litigation. In these instances, the more explicit formal compliance obligations on an agency responding to a GIPA request may better meet the needs of the applicant. Nevertheless, there is no basis for compelling an individual requesting personal information to apply under the GIPA Act. An agency responding to a privacy access request is entitled to rely on the conditions and limitations under the GIPA Act on withhold information.

It is submitted that the current flexibility in the interactions between the two legislative regimes should be maintained. However, the Office of the Information and Privacy Commission is well placed to provide guidance on how the different laws should interact.

## Reviews

Section 80 sets out thirteen classes of decisions of agencies in relation to access applications that an applicant or objector can seek to have formally reviewed. It can be argued that at least two of these grounds relate to routine administrative processes where a formal right of review is unnecessary, namely:

- a decision to transfer an access application to another agency, as an agency-initiated transfer; this is sometimes necessary because members of the public are not aware of which public sector agency manages a particular program
- a decision that information applied for is already available to the applicant; a large amount of information is now made available as open access information or under proactive or informal release and often all that is necessary is to direct an applicant to where it can be found.

In the limited instances where an applicant still has a valid objection to the way an agency makes these decisions, this might best be dealt with by way of a complaint to the Information Commissioner rather than a review.

An internal review by an agency involves making a new decision as if the original decision had not been made. Internal reviews must be completed within 15 working days. In most cases, this gives an agency sufficient time. However, cases arise where the person conducting the internal review finds that additional material needs to be located or further consultation needs to occur. Extending the time limit by a further 5 or 10 days to take account of these needs would be consistent with the way time frames can be extended for an original application.

Section 89 of the GIPA Act provides an applicant with the right to lodge a review directly with the Information and Privacy Commissioner (IPC) without lodging an internal review with the agency in the first instance. It is not unusual for the IPC to take more than six months to make a recommendation on a review, which may then require the agency to conduct an internal review. Consequently, there is no real time advantage to be gained by an applicant who goes directly to the IPC.

This restricts agencies from reviewing and providing assistance to access applicants who are aggrieved by an original decision. Direct review applications to the IPC may be contributing to their back log of reviews, particularly given the extended grounds for review available under section 80 of the GIPA Act. Extended delays detract from the fairness and equity of the access process.

If an agency was able to review a decision in the first instance, as was the case under Section 34 of the FOI Act 1989, this would often prove advantageous to the applicant by encouraging the agency to apply discretion where the circumstances warrant a degree of flexibility, and where the applicants concerns are minor issue/s with the original decision. This could promote a fairer, faster and a more accessible system.

## Name of the Act

The decision to depart from the name Freedom of Information Act when passing the GIPA Act ensured a clear break with the earlier legislation. However, many members of the public still think in terms of freedom of information. Corresponding legislation in other Australian jurisdictions uses ‘Freedom of Information Act’ (Commonwealth, Victoria, South Australia, Western Australia also USA and UK), ‘Right to Information Act’ (Queensland and Tasmania) or ‘Information Act’ (NT).

There may now be a case for renaming the Act to achieve greater consistency with other jurisdictions and to better meet with public expectations; the public is often confused by the current title.

**Information and Privacy Commissioner**

Under section 17 of the GIPA Act the IPC can

- provide information, advice, assistance and training to agencies and the public on any matters relevant to the Act
- assist agencies in connection with the exercise of their functions under the Act
- issue guidelines and other publications for the assistance of agencies in connection with their functions under this Act.

Under the former Freedom of Information Act, the Premier's Department and Office of the Ombudsman published a Freedom of Information Manual that provided a ready reference to new and experienced access officers on how the authors considered the provisions of the Act should be applied. Right to information officers would welcome a similar compilation that draws together and allows easy reference to the various guidance publications put out by the Information Commissioner.

**Conclusion**

Once again, FACS appreciates the opportunity to comment on legislation that has a significant influence on its operations. For more detail on any of the issues raised in this submission, please contact Dr John Gaudin on 88799018 or email john.gaudin@facs.nsw.gov.au. [redacted]

Yours sincerely

[redacted]

**Lyndsay Brooker**

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